U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th Street, Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)

Issue Date: 27 January 2003

Case No: 2000-BLA-0933

In the Matter of

RICHARD P. JOHNSON

Claimant

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

Respondent

APPEARANCES:

David A. Laite, Esq.
BROWN, LIPPERT, HEILE & EVANS
Cincinnati, Ohio
For Claimant

Elizabeth Ashley, Esq.
U.S. Department of Labor,
Office of the Solicitor
Cleveland, Ohio
For the Director

BEFORE: RUDOLF L. JANSEN
Administrative Law Judge

DECISION AND ORDER – DENYING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended. 30 U.S.C. § 901 *et seq.* Under the Act, benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Surviving dependents of coal miners whose deaths were caused by pneumoconiosis also may recover benefits. Pneumoconiosis, commonly known as black lung, is defined in the Act as "a chronic dust disease of the lung and its sequelae, including

pulmonary and respiratory impairments, arising out of coal mine employment." 30 U.S.C. § 902(b).

On July 19, 2000, this case was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was scheduled for September 13, 2002 in Cincinnati, Ohio. However, Claimant and the Director requested the case be submitted based upon the existing record. (ALJX 3). In my Order of September 13, 2002, I granted the parties' request.

The findings of fact and conclusions of law that follow are based upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. Although perhaps not specifically mentioned in this decision, each exhibit received into evidence has been reviewed carefully, particularly those related to the Claimant's medical condition. The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. References to "DX," "ALJX," and "CX" refer to the exhibits of the Director, Administrative Law Judge and Claimant, respectively.

ISSUES

The following issues remain for resolution:

1. Whether the evidence establishes a material change in condition pursuant to Section 725.309(d);

2. The length of Claimant's coal mine employment;

3. Whether Claimant has pneumoconiosis as defined by the Act and regulations;

4. Whether Claimant's pneumoconiosis arose out of coal mine employment;

5. Whether Claimant is totally disabled; and

6. Whether Claimant's disability is due to pneumoconiosis.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background and Procedural History

Richard P. Johnson was born on September 7, 1945 and he married Dolly Newsome on August 7, 1967, and they continue to reside together. They had no children who were under eighteen or dependent upon them at the time this claim was filed. (DX 1). Claimant also applied for Kentucky Workers' Compensation benefits, but his claim was denied. (DX 1).

On his application, Claimant complained of shortness of breath and other breathing problems. (DX 1, 22). Mr. Johnson smoked cigarettes the majority of his adult life. The record is inconsistent as to the number of cigarettes smoked per day by Mr. Johnson. The most recent account is that he smokes one package of cigarettes per day as noted on the Kentucky Workers' Compensation form as completed by Dr. Raghu R. Sundaram. (CX 7). Dr. Sundaram did not state the number of smoking years. Mr. Johnson reported that he smoked two to four packages of cigarettes per day for forty-seven years to Dr. David Lynch during an emergency room visit. (CX 4). Dr. Jon P. Tipton reported in his medical opinion that Claimant was currently smoking one-half package of cigarettes a day, but that he had smoked three to four packages of cigarettes per day for forty-eight years. (DX 3). In 1996, Claimant reported to Dr. James Foglesong that he smoked one to one and a half packages of cigarettes per day for thirty years. (DX 23). I am persuaded by the accounting Mr. Johnson made to Dr. Lynch during the emergency room visit. Mr. Johnson was complaining of chest pain and may have been more forthright about his smoking habit to receive accurate medical diagnosis and care. This account is also supported by Dr. Tipton's medical report. Therefore, I find that Mr. Johnson smoked two to four packages of cigarettes for forty-seven years, then reducing his smoking to one half package of cigarettes per day at the time of application.

Claimant filed his application for black lung benefits on June 1, 1999. The Office of Workers' Compensation Programs denied the claim on August 19, 1999. Pursuant to Claimant's request, the case was transferred to the Office of Administrative Law Judges for a formal hearing. (DX 25).

Coal Mine Employment

The duration of a miner's coal mine employment is relevant to the applicability of various statutory and regulatory presumptions.

Claimant bears the burden of proof in establishing the length of his coal mine work. *See Shelesky v. Director, OWCP*, 7 BLR 1-34, 1-36 (1984); *Rennie v. U.S. Steel Corp.*, 1 BLR 1-859, 1-862 (1978). On his application for benefits, Claimant alleged ten to fourteen years of coal mine employment. The evidence in the record includes a Social Security Statement of Earnings encompassing the years 1963 to 1985, employment history forms, applications for benefits, and affidavits from co-workers, family and acquaintances. (DX 17, 21, 23).

The Act fails to provide specific guidelines for computing the length of a miner's coal mine work. However, the Benefits Review Board has held consistently that a reasonable method of computation, supported by substantial evidence, is sufficient to sustain a finding concerning the length of coal mine employment. *See Croucher v. Director, OWCP*, 20 BLR 1-67, 1-72 (1996) (en banc); *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58, 1-60 (1988); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986); *Niccoli v. Director, OWCP*, 6 BLR 1-910, 1-912 (1984). Thus, a finding concerning the length of coal mine employment may be based on many different factors, and one particular type of evidence need not be credited over another type of evidence. *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-9 (1985).

The record contains fifteen affidavits regarding Mr. Johnson's coal mine employment history. (DX 9, 13, 23). Many of the affidavits are consistent in the assertion that Mr. Johnson worked for both M.L. Johnson Coal Company and J.N. Johnson Coal Company during 1964 to 1969. However, the affidavits also indicate that Claimant's employment involved logging and working at a saw mill to make timber props for the mines. Thus, I must determine whether Mr. Johnson's employment from 1964 to 1969 is qualifying coal mine employment under the Act.

The Sixth Circuit employs a two-prong function-situs test in determining whether a claimant's employment was that of a miner. *Director, OWCP v. Consolidation Coal Co.* [*Petracca*], 884 F.2d 485 (1988). An individual need not be engaged in the actual extracting or preparing of coal to meet the function test so long as the work he performs is integral to the coal production process. *Ray v. Williamson Shaft Contracting Co.*, 14 BLR 1-105 (1990)(en banc). The focus of the inquiry is whether the function is integral to extraction or preparation of coal as opposed to being merely ancillary to the delivery and commercial use of processed coal. Here, Claimant made timber props which were employed within the mines to prevent cave-ins and allow for the extraction of coal. Two separate coal companies employed Mr. Johnson to perform this work. Based on these factors, I find that Claimant's employment

satisfies the function prong of the test. The focus of the situs prong of the test is whether the individual worked in or around a coal mine. The Act defines "coal mine" as:

> [A]n area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations and other property, real or personal, placed upon, under or above the surface of such land by any person, used in, or to be used in, or resulting from the work of extracting in such area bituminous coal, lignite or anthracite from its natural deposits in the earth and by any means or method, and in the work of preparing coal so extracted, and includes custom coal preparation facilities.

20 C.F.R. § 725.101(a)(23). Although the Act covers facilities not located on the actual property of the mine, physical proximity of the work site to the mine and the worker's exposure to coal dust are significant in determining whether the situs is qualifying under the definition. Here, the record does not contain evidence regarding the location of the sawmill or areas in which Mr. Johnson performed logging in relation to the coal mine itself nor evidence referring to the amount of coal dust exposure. As a result, I am unable to determine whether the situs of Mr. Johnson's work was in or around a coal mine. It is the claimant's burden to prove that his work was performed in or around a coal mine. *Whisman v. Director, OWCP*, 8 BLR 1-96 (1985). Therefore, Claimant has failed to prove by a preponderance of the evidence that his employment from 1964 through 1969 for M.L. Johnson Coal Company and J.N. Johnson Coal Company was as a miner as defined by the Act. I find that the years Claimant worked making timber props for the M.L. Johnson and J.N. Johnson Coal Companies are not qualifying coal mine employment under the Act.

Based upon my review of the record, I place the greatest weight on the Social Security records because they are documented, independent evidence of Claimant's coal mine employment. Using these records, I credit Claimant with coal mine work for each quarter year in which he earned fifty dollars or more as a coal miner. *See Croucher*, 20 BLR at 1-74; *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984); 20 C.F.R. § 404.140(b). The Social Security records indicate that Mr. Johnson worked for Pratt Brothers Coal Company of Whitesburg, Kentucky, for three-quarters of 1974. (DX 23). In addition, the records show that Mr. Johnson worked for Tackett Branch Coal Company of Pikeville, Kentucky, from

1978 to 1980, with two and one-quarter years. (DX 23). Therefore, in accordance with the Social Security records, I credit Mr. Johnson with three years of qualifying coal mine employment.

Mr. Johnson stated in the CM-911a form that he extracted coal for Pratt Brothers Coal Company and drove a coal truck for Tackett Branch Coal Company. (DX 22). Mr. Johnson described his employment to Dr. Tipton as hand-loading coal, working at the face, and driving a coal truck. (DX 3).

MEDICAL EVIDENCE[1]

X-ray reports

Exhibit	Date of X-ray	Date of Reading	Physician/ Qualifications	Interpretation
CX 8	03/28/02	03/28/02	Bassali/B	1/1
CX 7	03/28/02	03/28/02	Sundaram/unknown	2/1
CX 7	03/28/02	03/28/02	illegible/unknown	1/1
CX 7	03/09/02	03/09/02	Sundaram/unknown	2/2
CX 3	03/08/02	08/21/02	Brandon/BCR, B	1/1
CX 3	03/08/02	03/11/02	Farneman/unknown	Probable COPD
CX 1	02/03/00	02/03/00	Antry/unknown	COPD
CX 1	02/01/00	02/1/00	Antry/unknown	COPD
DX 5	06/22/99	08/12/66	Gaziano/B	Negative for pneumoconiosis
DX 6	6/22/99	07/07/99	Leef/B	Negative
CX 2	05/12/99	05/12/99	Antry/unknown	COPD
CX 2	03/12/99	03/12/99	Antry/unknown	COPD
CX 2	02/20/99	02/20/99	Harris/unknown	COPD
DX 23	10/15/96	11/13/96	Sargent/BCR, B	Negative for pneumoconiosis
DX 23	10/15/96	10/16/96	Antry/unknown	Parenchymal density on left lobe

"B" denotes a "B" reader and "BCR" denotes a board-certified radiologist. A "B" reader is a physician who has demonstrated

[1] All medical evidence contained in the record is included in this section, both newly-submitted and that of record prior to the January 9, 1997 denial.

proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successfully completing an examination conducted by or on behalf of the Department of Health and Human Services (HHS). A board-certified radiologist is a physician who is certified in radiology or diagnostic roentgenology by the American Board of Radiology or the American Osteopathic Association. *See* 20 C.F.R. § 718.202(a)(ii)(C).

Pulmonary Function Studies

Exhibit/ Date	Physician	Age/ Height	FEV_1	FVC	MVV	FEV_1/ FVC	Tracings	Comments
CX 7 02/26/02	Sundaram	56/66	1.28	2.51	49.8	51	YES	
CX 6 06/06/98	Sundaram	53/65	1.74	3.70	53.5	47	YES	
DX 23 10/15/96	Long							10/15/96 vents are acceptable
DX 23 10/15/96	Foglesong	51/68.5	1.82	3.91	68	47	YES	Good cooperation

Arterial Blood Gas Studies

Exhibit	Date	Physician	pCO_2	pO_2	Resting/ Exercise
CX 4	02/07/00	Foglesong	43	54.6	Resting
DX 4	06/22/99	Tipton	40	69	Resting
CX 5	05/14/99	Lynch	34	80	Resting
DX 23	10/15/96	Foglesong	39.8	68	Resting
			41.5	101	Exercise

Narrative Medical Evidence

Joseph A. Holtel, D.O., issued medical reports on May 16, 2002 and July 17, 2002. Dr. Holtel agreed with the assessment by Dr. Raghu R. Sundaram that Claimant suffered from lung disease that is "secondary to coal dust exposure." (CX 9). Dr. Holtel did not specify the type of lung disease Claimant suffered from. He opined that Claimant was totally disabled and unable to "participate in

any gainful employment," but found it "difficult to separate how much of [Mr. Johnson's] lung disease is due to coal dust exposure versus...his continued smoking." (CX 9). Dr. Holtel's qualifications are not of record.

Andrius Ruksenas, M.D., issued statements regarding Claimant's medical condition on April 29, 2002 and May 23, 2002. (CX 10). He diagnosed Claimant with chronic obstructive pulmonary disease (COPD) caused in part by coal dust exposure. Dr. Ruksenas stated that Claimant was totally disabled "as a result of chronic lung disease which is caused by coal dust exposure." (CX 10). Dr. Ruksenas' qualifications are not of record.

Raghu R. Sundaram, M.D., examined Claimant on February 26, 2002 and June 6, 1998 and prepared medical reports of the examinations. (CX 6, 7). He issued an additional statement on April 1, 2002. (CX 7). Taking into consideration a fourteen-year coal mine employment history and a forty-seven pack year smoking history, Dr. Sundaram diagnosed Claimant with pneumoconiosis. He attributed this diagnosis to "prolonged exposure to coal dust over fourteen years." (CX 7). In the April 1, 2002 statement, Dr. Sundaram opined that Claimant was "totally disabled as a result of his chronic pulmonary disease," caused in part by his coal dust exposure. Dr. Sundaram's credentials are not of record.

Jon P. Tipton, M.D., examined Claimant on June 27, 1999 and issued a medical report on that date. (DX 3). Dr. Tipton provided a full pulmonary workup, including chest x-ray, pulmonary function and arterial blood gas studies, and diagnosed Claimant with arteriosclerotic heart disease and "some degree of COPD." (DX 3). He considered an eighteen year coal mine employment history, noting that Claimant hand-loaded coal, worked at the face, and drove a coal truck. Regarding Claimant's medical history, Dr. Tipton accounted for Mr. Johnson's chronic bronchitis, bladder cancer and recent heart attack. In addition, he noted that Claimant had a forty-eight year smoking history, smoking one half package of cigarettes at the time of the examination, but smoking three to four packages of cigarettes a day in prior years. He opined that Claimant was totally disabled from COPD caused by smoking and coal dust exposure. He attributed forty percent (40%) of the disability to coal dust exposure and sixty percent (60%) to smoking. Dr. Tipton's qualifications are not of record.

James Foglesong, D.O., examined Claimant on October 15, 1996. (DX 23). He also provided a full pulmonary workup, including chest x-ray, pulmonary function and arterial blood gas studies. Dr. Foglesong diagnosed Claimant with COPD due to smoking and coal dust exposure. In making his diagnosis, Dr. Foglesong noted a thirty year smoking history of one to one and a half packages of

cigarettes a day and Claimant's medical history of bladder cancer. He found Claimant to have a moderate to severe obstructive respiratory impairment; however, he was uncertain as to the etiology of the respiratory impairment noting that Claimant had greater than "40 pack years of smoking."[2] (DX 23). Dr. Foglesong's qualifications are not of record.

The record contains physician notes from Dr. D.H. Stamper and Dr. Franklin D. Demint. (CX 11). These records show a diagnosis of COPD in response to Claimant's complaints of shortness of breath. In addition, these notes reflect treatment for bronchitis, COPD, and gastritis.

In addition, the record contains emergency room reports. Dr. Ronald Nesbitt examined Claimant on February 3, 2000. (CX 4). Claimant had come to the emergency room with complaints of shortness of breath and a cough. Dr. Nesbitt admitted Claimant to rule out a myocardial ischemia. Dr. David Lynch examined Claimant on May 14, 1999 in response to Claimant's complaint of chest pain. (CX 5). Dr. Lynch admitted Claimant for observation. I have considered these records but do not find them relevant to the determination of entitlement to benefits.

DISCUSSION AND APPLICABLE LAW

Because Claimant filed his application for benefits after March 31, 1980, this claim shall be adjudicated under the regulations at 20 C.F.R. Part 718. To establish entitlement to benefits under this part of the regulations, a claimant must prove by a preponderance of the evidence that he has pneumoconiosis, that his pneumoconiosis arose from coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. 20 C.F.R. §725.202(d); *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989). In *Director, OWCP v. Greenwich Collieries, et al.*, 114 S.Ct. 2251 (1994), the United States Supreme Court stated that where the evidence is equally probative, the claimant necessarily fails to satisfy his burden of proving the existence of pneumoconiosis by a preponderance of the evidence.

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[2] The report contains two different accounts of smoking history length: thirty years and over forty years.

Duplicate Claim

Mr. Johnson's previous claim for benefits was denied on January 9, 1997. As a result, the claim involved in this proceeding, filed on June 1, 1999, constitutes a "duplicate claim" under the regulations. The provisions of Section 725.309(d) apply to duplicate claims and are intended to provide relief from the traditional notions of *res judicata*. Under Section 725.309(d), duplicate claims must be denied on the grounds of the prior denial unless the evidence demonstrates that one of the applicable conditions of entitlement has changed since the prior denial. 20 C.F.R. § 725.309(d). Because Claimant last worked as a coal miner in the state of Kentucky, the law as interpreted by the United States Court of Appeals for the Sixth Circuit applies to this claim. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989).

Under the Sixth Circuit's approach, an administrative law judge must analyze whether the newly-submitted evidence in a duplicate claim demonstrates a worsening of the claimant's condition to determine whether a material change in condition is established. *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, (6th Cir. 2001); *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994); *Steward v. Wampler Brothers Coal Co.*, 22 BLR 1-80 (2000)(en banc); *Flynn v. Grundy Mining Co.*, 21 BLR 1-40 (1997). The administrative law judge must consider all of the new evidence, both favorable and unfavorable, to determine whether it proves at least one of the elements of entitlement that formed the basis for the prior denial. In addition, the administrative law judge must assess whether the newly-submitted evidence is substantially more supportive of the claim or how it differs qualitatively from the earlier evidence. *Kirk*, 264 F.3d at 609; *Ross*, 42 F.3d at 999.

In the denial of Claimant's prior claim, OWCP determined that the evidence failed to establish that he suffered from pneumoconiosis arising out of coal mine employment and that he was totally disabled due to pneumoconiosis. If the newly-submitted evidence establishes a worsening in Claimant's condition, it will demonstrate a material change in condition. Then, I must review the entire record to determine entitlement to benefits and compare the sum of the newly-submitted evidence with the earlier evidence. *See Ross*, 42 F.3d at 999; *Kirk*, 264 F.3d at 609.

Newly Submitted Evidence: Pneumoconiosis

Under the Act, "'pneumoconiosis' means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. §

902(b). Section 718.202(a) provides four methods for determining the existence of pneumoconiosis. Under Section 718.202(a)(1), a finding of pneumoconiosis may be based upon x-ray evidence. In evaluating the x-ray evidence, I assign heightened weight to interpretations of physicians who qulaify as either a board-certified radiologist or "B" reader. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985). I assign greatest weight to interpretations of physicians with both of these qualifications. *See Woodward v. Director, OWCP*, 991 F.2d 314, 316 n.4 (6th Cir. 1993); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984). Because pneumoconiosis is a progressive disease, I also may properly accord greater weight to the interpretations of the most recent x-rays, especially where a significant amount of time separates the newer from the older x-rays. *See Woodward v. Director, OWCP,* 991 F.2d 314 (6th Cir. 1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-154 (1989) (en banc); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131, 1-135 (1986).

The newly submitted evidence of record contains thirteen interpretations of nine chest x-rays. Of these interpretations, two were negative for pneumoconiosis, five were positive for pneumoconiosis, and six diagnosed chronic obstructive pulmonary disease, but were silent as to the presence of pneumoconiosis. Both of the negative-interpreting physicians are B-readers. Among those positive-interpreting physicians, one is a B-reader and one is a dually qualified physician. Because all of the positive readings are of later x-rays and are verified by highly-qualified physicians, I find that the x-ray evidence supports a finding of pneumoconiosis under Section 718.202(a)(1).

Under Section 718.202(a)(2), a claimant may establish pneumoconiosis through biopsy evidence. This section is inapplicalbe to this claim because the record contains no such evidence.

Under Section 718.202(a)(3), a claimant may prove the existence of pneumoconiosis if one of the presumptions at Section 718.304 to 718.306 applies. Section 718.304 requires x-ray, biopsy, or equivalent evidence of complicated pneumoconiosis. Because the record contains no such evidence, this presumption is unavailable. The presumptions at Sections 718.035 and 718.306 are inapplicable because they only apply to claims that were filed before January 1, 1982, and June 30, 1982, respectively. Because none of the above presumptions apply to this claim, Claimant has not established pneumoconiosis pursuant to Section 718.202(a)(3).

Section 718.202(a)(4) provides that a claimant may establish the presence of pneumoconiosis through a reasoned medical opinion.

A reasoned medical opinion contains the underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts and other data on which he bases his diagnosis. *Id*.

Dr. Holtel opined that Claimant suffered from lung disease caused by smoking and coal dust exposure. Although Dr. Holtel did not diagnose Claimant with pneumoconiosis, any chronic pulmonary disease arising out of coal mine employment is included in the statutory definition of pneumoconiosis. 20 C.F.R. § 718.201. Dr. Holtel did not provide the reasoning or documentation in his opinion that led to his diagnosis of lung disease. An unreasoned or undocumented opinion may be given little or no weight. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc). Therefore, I find his opinion not to be well documented or reasoned and entitled to diminished weight.

Dr. Ruksenas diagnosed Claimant with chronic obstructive pulmonary disease caused, in part, by coal dust exposure, fitting within the statutory definition of pneumoconiosis. However, Dr. Ruksenas did not indicate the data or reasoning behind his diagnosis or indicate that he considered Claimant's social, work or smoking histories. An unsupported medical conclusion is not a reasoned diagnosis. *Fuller v. Gibraltar Corp.*, 6 BLR 1-1292 (1984). As his opinion is poorly documented and poorly reasoned, I assign his opinion less weight.

Considering a fourteen-year coal mine employment history and a forty-seven pack years smoking history, Dr. Sundaram diagnosed Claimant with pneumoconiosis. Dr. Sundaram credited Claimant with eleven more years coal mine employment than is evidenced in the record. The basis for his diagnosis was "prolonged exposure to coal dust over fourteen years." (CX 7). As Dr. Sundaram's opinion is based on an inaccurate work history, I find his opinion to be not well documented or reasoned and assign it less weight.

Dr. Tipton considered an eighteen-year coal mine employment history in diagnosing Claimant with chronic obstructive pulmonary disease due to smoking and coal dust exposure. Although he considered an accurate smoking history, his reliance on a coal mine employment history of eighteen years is inaccuarate. I find his opinion not to be well documented or reasoned and assign it less weight.

The physician notes of Drs. Stamper and Demint reveal a diagnosis of chronic pulmonary disease. These notes do not address

the etiology of that diagnosis. Therefore, I do not find them to be probative of the issue of pneumoconiosis and causation.

In sum, all the physician opinions of record opine that Claimant suffers from a chronic pulmonary disease caused, at least in part, by his coal dust exposure. Although the record contains no conflicting physician opinions, I am unable to find that Claimant has established pneumoconiosis under Section 718.202(a)(4), as the medical opinions diagnosing pneumoconiosis are poorly documented and poorly reasoned. Thus, I find that the evidence fails to support a finding of pneumoconiosis under Section 718.202(a)(4).

In determining whether Claimant has established the presence of pneumoconiosis under Section 718.202(a), I consider five positive x-rays, two negative x-rays, and the positive, but poorly-reasoned physician opinions. As Claimant has established the presence of pneumoconiosis under Section 718.202(a)(1), I find that Claimant has established by a preponderance of the evidence that he has pneumoconiosis. Taking the newly submitted evidence in conjunction with the old reveals that Claimant's condition has worsened and thus, a material change in condition exists. I find that the newly submitted x-ray evidence differs qualitatively from the x-ray evidence submitted prior to the 1997 denial. The previous evidence did not support a pneumoconiosis diagnosis. The new evidence is substantially more supportive of Claimant as it is sufficient to establish a finding of pneumoconiosis under Section 718.202(a)(1).

As I have found a worsening in Claimant's condition demonstrating a material change in condition, I must review the entire record to determine entitlement to benefits and compare the sum of the newly-submitted evidence with the earlier evidence.

Full Review of the Record

Pneumoconiosis and Causation

As discussed above, I find the newly submitted evidence to support a finding of pneumoconiosis under Section 718.202(a). However, in undertaking a full review of the record, I shall combine the newly submitted and old evidence to determine presence of pneumoconiosis.

In evaluating the evidence under Section 718.202(a)(1), the record contains fifteen interpretations of ten chest x-rays. Of these interpretations, three were negative for pneumoconiosis, six were positive for pneumoconiosis, and six diagnosed chronic obstructive pulmonary disease, but were silent as to the presence

of pneumoconiosis. Two of the negative-interpreting physicians are B-readers and one physician is dually qualified. Among those positive-interpreting physcians, one is a B-reader and one is a dually qualified physician. Because all of the positive readings are of later x-rays and are verified by highly-qualified physicians, I find that the x-ray evidence supports a finding of pneumoconiosis under Section 718.202(a)(1).

Under Section 718.202(a)(2), a claimant may establish pneumoconiosis through biopsy evidence. This section is inapplicable to this claim because the record contains no such evidence.

Under Section 718.202(a)(3), a claimant may prove the existence of pneumoconiosis if one of the presumptions at Section 718.304 to 718.306 applies. As discussed above, none of the presumptions apply to this claim.

Section 718.202(a)(4) provides that a claimant may establish the presence of pneumoconiosis through a reasoned medical opinion. As discussed above, I found all of the newly submitted physician opinions to be poorly documented and poorly reasoned. The evidence of record antedating the filing of this duplicate claim contains one additional physician opinion.

Dr. Foglesong opined that Claimant suffered from chronic obstructive pulmonary disease caused by smoking and coal dust exposure. Contained within the opinion are two different accounts of smoking history. Absent from the opinion is any discussion of Claimant's coal mine employment. Dr. Foglesong based his diagnosis on results of a pulmonary function study and Claimant's smoking history and coal dust exposure. I find Dr. Foglesong's opinion to be poorly documented and reasoned and I assign it less weight.

In sum, under Section 718.202(a)(4), I hold the evidence fails to support a finding of pneumoconiosis as each of the physician opinions are poorly documented and poorly reasoned.

In weighing all the evidence, I consider six positive chest x-rays, three negative x-rays, and the discredited positive diagnoses of physicians. As I find Claimant has established the presence of pneumoconiosis under Section 718.202(a)(1), Claimant has established pneumoconiosis by a preponderance of the evidence.

Once pneumoconiosis has been established, the burden is upon the Claimant to demonstrate by a preponderance of the evidence that the pneumoconiosis arose out of the miner's coal mine employment. 20 C.F.R. § 718.203(b) provides:

> If a miner who is suffering or has suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be a rebuttable presumption that the pneumoconiosis arose out of such employment.

I have found that Claimant was a coal miner for three years, and that he had pneumoconiosis. Claimant is not entitled to the presumption that his pneumoconiosis arose out of his employment in the coal mines.

Because Claimant has established less than ten years of coal mine employment, the regulations require proof by medical evidence that his pneumoconiosis arose "in part" from coal mine employment. 20 C.F.R. § 718.203(c). *See Stomps v. Director, OWCP*, 816 F.2d 1533, 1535 (11th Cir. 1987); *Southard v. Director, OWCP*, 732 F.2d 66, 71 (6th Cir. 1984).

Among the physicians who assigned an etiology to Claimant's lung disease, all opined that Claimant's pneumoconiosis arose, at least in part, from coal mine employment. However, Drs. Tipton and Sundaram based their opinions on an erroneous coal mine employment history, crediting Claimant with longer employment than the record reveals. Medical opinions predicated upon an erroneous coal mine employment history may be given little weight regarding the etiology of the miner's disease. *Barnes v. Director, OWCP*, 19 BLR 1-71 (1995)(en banc on reconsideration). Furthermore, Drs. Foglesong, Holtel and Ruksenas did not document Mr. Johnson's coal mine employment history in their opinions and do not provide their basis for coal mine employment as the etiology for Claimant's pulmonary disease. I do not find their opinions to be competent regarding the etiology of Claimant's pneumoconiosis. Thus, the evidence fails to establish that Claimant's pneumoconiosis arose out of coal mine employment.

Total Disability

A miner is considered totally disabled when his pulmonary or respiratory condition prevents him from performing his usual coal mine work or comparable work. 20 C.F.R. § 718.204(b). Non-respiratory and non-pulmonary impairments have no bearing on a finding of total disability. *See Beatty v. Danri Corp.*, 16 BLR 1-11, 1-15 (1991). Section 718.204(b) provides several criteria for establishing total disability. Under this section, I first must evaluate the evidence under each subsection and then weigh all of the probative evidence together, both like and unlike, to determine whether Claimant has established total respiratory disability. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1987).

Under Sections 718.204(b)(2)(i) and (ii), total disability may be established with qualifying pulmonary function studies or arterial blood gas studies. A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values that are equal to or less than the applicable table values found in Appendices B and C of Part 718. See 20 C.F.R. § 718.204(b)(2)(i), (ii). A "non-qualifying" test produces results that exceed the table values. Mr. Johnson produced two qualifying pulmonary function studies.[3] The October 15, 1996 study was deemed valid by Dr. Sarah E. Long. The evidence supports a finding of total disability under Section 718.204(b)(2)(i).

Mr. Johnson produced one qualifying arterial blood gas study and three non-qualifying arterial blood gas studies. The qualifying study is the most recent by seven months. More weight may be accorded to the results of a recent blood gas study over one which was conducted earlier. *Schretroma v. Director, OWCP*, 18 BLR 1-17 (1993). I assign more weight to the most recent blood gas study. The evidence supports a finding of total disability under Section 718.204(b)(2)(ii).

Section 718.204(b)(2)(iii) provides that a claimant may prove total disability through evidence establishing cor pulmonale with right-sided congestive heart failure. This section is inapplicable to this claim because the record contains no such evidence.

Under Section 718.204(b)(2)(iv), total disability may be established if a physician exercising reasoned medical judgment based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a respiratory or pulmonary impairment prevents the miner from engaging in his usual coal mine work or comparable and gainful work.

Drs. Holtel, Ruksenas, Sundaram, Foglesong, and Tipton all opined that Claimant was totally disabled due to his lung disease. Neither Dr. Stamper nor Dr. Demint assessed whether Mr. Johnson was totally disabled.

Only Dr. Tipton documented the type of work Mr. Johnson performed in his coal mine employment. A qualified physician opinion of total disability must compare the exertional

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[3] The record contains the results of three pulmonary function studies. All qualify under the Act. However, each test indicates a different height for Mr. Johnson. The October 15, 1996 study indicates Mr. Johnson is 68.5 inches tall; the June 6, 1998 study states 65 inches; and the February 26, 2002 study states 66 inches. If the June 6, 1998 study were evaluated using either of the other two heights, it would be a non-qualifying study. Therefore, I will not include this study in the total disability analysis.

requirements of the miner's usual coal mine employment against his physical limitations. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000). An opinion which does not do so may be given less weight. *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993). Thus, I assign less weight to the opinions of Drs. Holtel, Ruksenas, Sundaram and Foglesong as they did not address the exertional requirements of Mr. Johnson's coal mine employment in assessing total disability. I assign Dr. Tipton's opinion full weight regarding total disability. Dr. Tipton compared the exertional requirements of Mr. Johnson's former coal mine employment to his physical limitations and therefore I find it well-reasoned regarding total disaiblity. Dr. Tipton's opinion is uncontested in the record, therefore, I find that Claimant has established total disability under Section 718.204(b)(2)(iv).

In weighing the evidence regarding total disability, I consider two qualifying pulmonary function tests, one qualifying arterial blood gas study, three non-qualifying arterial blood gas study, four discredited physician opinions of total disability and one fully-weighted physician opinion of total disability. I find that Claimant has established by a preponderance of the evidence that he was totally disabled.

Total Disability due to Pneumoconiosis

Upon demonstrating that he is totally disabled, Claimant must establish that his total disability is due at least in part to pneumoconiosis. *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Youghiogheny & Ohio Coal Co. v. McAngues*, 996 F.2d 130, 17 BLR 2-146 (6th Cir. 1993), *cert. denied*, 114 S.Ct. 683 (1994); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). 20 C.F.R. §718.204(c)(1) provides that a miner is totally disabled due to pneumoconiosis where pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's total disability. The Sixth Circuit holds that total disability must be due at least in part to pneumoconiosis. *Adams v. Director, OWCP*, 886 F.2d 818, 825 (6th Cir. 1989); *Zimmerman v. Director, OWCP*, 871 F.2d 564, 566 (6th Cir. 1989).

Regarding etiology of Mr. Johnson's total disability, Dr. Holtel opined that he could not "separate how much of his lung disease is due to coal dust exposure...versus his continued smoking." (CX 9). However, Dr. Holtel found coal dust exposure to be a component in the etiology of Mr. Johnson's lung disease. Dr. Holtel's opinion contains no documentation of the data or information used in arriving at his diagnosis or the etiology thereof. Therefore, I find his opinion not to be well documented or reasoned and assign it less weight.

Dr. Ruksenas merely stated in his opinion that Mr. Johnson's totally disabling respiratory impairment was caused by coal dust exposure. He did not provide the documentation or reasoning that led him to that conclusion. I find his opinion to be poorly documented and poorly reasoned and assign it less weight.

Dr. Sundaram opined that Mr. Johnson's disability was caused in part by coal dust exposure. In assigning total disability etiology, Dr. Sundaram did not set forth his findings or data. Therefore, I find his opinion not to be well documented or reasoned.

Dr. Foglesong was "uncertain" as to the etiology of Claimant's respiratory impairment, noting Claimant's extensive smoking history. As Dr. Foglesong made no conclusions regarding the etiology of Claimant's total disability, I do not find his opinion probative on the issue of total disability causation.

Dr. Tipton opined Claimant's disabling respiratory impairment was due to smoking and coal dust exposure. He attributed sixty percent (60%) of the impairment to smoking and forty percent (40%) to coal dust exposure. Dr. Tipton credited Claimant with fourteen more years coal mine employment than the record reveals. Due to this inaccuracy, I find Dr. Tipton's opinion to be poorly documented and assign it less weight.

In weighing the evidence regarding total disability causation, each physician opinion of total disability assigns coal dust exposure as etiology, at least in part. However, the medical opinions regarding total disability causation are all poorly reasoned and poorly documented. As such, they may be given little or no weight. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989). Therefore, I am unable to find that Claimant has established that his total disability is due, in part, to pneumoconiosis.

Although Claimant has established a material change in condition, that he suffers from pneumoconiosis, the evidence fails to establish that his pneumoconiosis arose out of coal mine employment and that his total disability was caused by pneumoconiosis. Accordingly, this claim must be denied.

ORDER

The claim of Richard P. Johnson for benefits under the Act is hereby **DENIED**.

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Rudolf L. Jansen
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington D.C. 20013-7601. A copy of this Notice of Appeal also must be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20210.